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Supreme Court of the United States

OCTOBER TERM 1956

No. ~~1007~~ 172

THE TEXAS COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA as Owner of the USS. *Rachamkin* and Ten Other Naval Vessels of the United States,

and

EVELYN ECKERT, Administratrix of the Estate of EDWARD JAMES ECKERT, JR., Deceased, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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No. .....

THE TEXAS COMPANY,

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UNITED STATES OF AMERICA as owner of the USS *Ruchamkin* and ten other naval vessels of the United States,

and

EVELYN ECKERT, administrator of the estate of EDWARD JAMES ECKERT, JR., deceased, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Petitioner, The Texas Company, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, reported in 241 F. 2d 819 and 1957 A. M. C. 201 (Appendix p. 42). That Judgment affirmed in part and reversed in part two decrees, one final and one interlocutory, entered in the admiralty by the United States District Court for the Eastern District of Virginia in accordance with its opinion. The District Court's opinion which it adopted as its findings of fact and conclusions of law, is reported in 141 F. Supp. 97, also in 1956 A. M. C. 1245 (Appendix p. 29). The Court of Appeals remanded the case to the District Court for further proceedings not inconsistent with its opinion.

Jurisdiction.

The judgment of the Court of Appeals was entered on January 25, 1957. A timely petition for rehearing was denied by order of the Court entered March 11, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254 (1).

Questions Presented.

All suits involved in this case arose out of a collision on the night of November 14, 1952, about fifty-five miles off Cape Henry, Virginia, between the petitioner's tanker *Washington* (en route from a Gulf port to Philadelphia along the established coastal shipping lanes) and the destroyer USS *Ruchamkin*, one of a task group of eleven naval vessels operating as a unit, occupying about twelve square miles of ocean and engaged in the peacetime practice of an amphibious maneuver called "Operation Seascape".

The District Court, sitting in Admiralty, after a full trial in open court, found the commanding officer of the colliding *Ruchamkin*, and the officers in command of the naval formation as a whole who were stationed on board the flagships *Fremont* and *Hollis*, guilty of negligence that proximately caused the collision. The tanker *Washington* was found free from fault. The United States was held liable under the Public Vessels Act and, upon the request of government counsel for a determination of the point, the District Judge found liability on *in rem* principles against three of the eleven naval vessels of the task group, the *Ruchamkin*, *Fremont* and *Hollis*.

The Court of Appeals affirmed the finding of negligence against the three naval officers, but without pointing out or even alluding to the question whether there were clear errors in the findings below, it reversed the exoneration of the tanker and the holding of the flagships *Fremont* and *Hollis* to liability on *in rem* principles. By imposing liability on the tanker, the opinion of the Court of Appeals rendered pertinent the question of *in rem* liability on the part of the naval vessels because of the admiralty rule respecting division of damages.

The decision of the Appellate Court treats naval vessels differently from those which are privately-owned, despite the intent of Congress to the contrary, expressed in the Public Vessels Act. By imposing liability on the tanker, the decision in effect holds that a merchant vessel on her regular course in an established shipping lane must keep out of the way of a negligently performed naval maneuver. The decision reserves to the Navy the exclusive use of a large area of the high seas, and imposes on the merchantman a burden not contemplated by the Statutory Rules of Navigation. In reaching its decision, the Appellate Court not only reversed the findings of the District Court, but substituted new findings of fact which, we submit, are not justified by the record.

We therefore ask this Court to consider two questions which are of vital importance to merchant shipping.

I.

Are not the flagships *Fremont* and *Hollis* liable *in rem* under the Public Vessels Act when the officers in command of the naval task group, stationed on their respective bridges and using their respective communication facilities, were admittedly guilty of negligence that proximately caused a naval vessel under their command (the *Ruchamkin*) to collide with the tanker *Washington*?

A denial of such *in rem* liability in respect of naval vessels is contrary to the broad interpretation given the Public Vessels Act by this Court in *Canadian Aviator, Ltd.* v. *United States*, 324 U. S. 215, is also in conflict with the decision of the Court of Appeals for the Second Circuit in *United States* v. *The Australia Star*, 172 F. (2d) 472, and is contrary to the basic principle of *in rem* liability under the maritime law as expressed by this Court in *The Eugene F. Moran*, 212 U. S. 466.

II.

May a United States Court of Appeals substitute its own findings of fact for those of the District Court sitting in Admiralty, based on the testimony of witnesses heard by him in open court, without a determination that the findings below were clearly erroneous?

The action of the Court of Appeals in this matter is in direct conflict with the decisions of this Court in *McAllister* v. *United States*, 348 U. S. 19, *United States* v. *U. S. Gypsum Co.*, 333 U. S. 364, and *United States* v. *Oregon State Medical Society*, 343 U. S. 326.

Statutes Involved.

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Statement of the Case.

The Facts.

Shortly before 2:00 A. M. on November 14, 1952, the watch of the tanker *Washington* was set and all her navigation lights were burning brightly as she steamed along the coast to Philadelphia. Since midnight, when the Second Mate took over the watch, lights of other vessels were observed from port to starboard. Most of these lights were white and to starboard. They extended along the horizon much like the lights of a village, appearing to be some distance off. From time to time, a check of the lights was made on radar, but none appeared to be within five miles, and, as the tanker proceeded, the bearing of the successive lights drew aft.

Certain of these white lights, it was learned subsequent to the collision, were displayed by two flotillas of naval vessels engaged in peacetime practice maneuvers off the coast. One of the flotillas was the group performing operation "Seascape" and the other an aircraft carrier group. Other lights observed were evidently exhibited by numerous unassociated merchantmen traversing that busy area.

The vessels comprising formation "Seascape" necessarily maneuvered in concert much as a company of soldiers on a drill field. To insure their unity of movement, a naval officer called the O. T. C. (Officer in Tactical Command) was stationed aboard the USS *Fremont* with his staff of some fifty officers and men. That vessel was designated as flagship and occupied the central position in the formation around which other vessels were stationed according to the written plan. Another officer, subordinate to the O. T. C. and designated Screen Commander, was stationed with his staff

aboard the USS *Hollis*. He directed the movements of the five destroyer type vessels, comprising the anti-submarine screen, stationed in an arc between two and three miles ahead of the circular formation of heavy ships.

At the time of the collision, four of the destroyers were on their assigned stations, but the fifth, the *Ruchamkin*, was returning thereto from a reconnaissance mission.

The O. T. C. and the Screen Commander issued orders to all ships respecting courses and speeds to be followed by the formation as it navigated in the area. Through the radios and radars aboard their flagships, these officers constantly observed the other ships in the formation to insure that their orders were being promptly obeyed and that all ships maintained their assigned stations. Although each vessel in the formation was steered by its individual captain, he was required at all times to follow the orders of the flag officers unless his vessel was in immediate danger.

In the course of exercising operational control of this seagoing juggernaut, the Screen Commander ordered, and the O. T. C. allowed, the *Ruchamkin* like a hidden missile to come up from behind and pass the formation on its starboard side at a speed of over four times that of all other vessels of the formation which had been ordered by the O. T. C. to slow down to permit the *Washington* to pass ahead of the group from port to starboard. Obscured from the tanker by the numerous lights of the intervening naval vessels, until less than a thousand yards apart, and unmindful of naval radio messages concerning the *Washington*'s presence, the *Ruchamkin* collided with the tanker.

A more detailed statement of the circumstances leading up to and surrounding the collision may be found in the opinion of the District Court. See Appendix, page 29.

Action of the Courts Below.

The District Court found that the tanker had no warning that she was approaching a task group, nor any opportunity to defer to it; that once inside, there was nothing for her to do but continue past the heavy ships in the manner contemplated by the O. T. C. as he slowed his formation to give way to her; that while she was within the task group the lights of the *Ruchamkin* were not distinguishable from those of the vessels in the intervening formation; that the collision occurred within a minute or two after the *Washington* and *Ruchamkin* more or less simultaneously sighted one another and that neither had sufficient opportunity to avoid the other after such sighting. The District Judge accordingly exonerated the tanker.

The *Ruchamkin* was declared to be at fault because of the failure of her officers to receive or regard the advice given over the naval voice radios concerning the tanker's progress. Although this ruling was sufficient to dispose of the case in view of the tanker's innocence, the District Judge also decided the liability of the *Fremont* and *Hollis* because the Government requested a ruling on that issue. He declared that the Screen Commander was guilty of negligence that contributed to the collision when he issued the order to the *Ruchamkin* to "expedite" across the tanker's course at a time when all of the other naval ships had been ordered by the O. T. C. to slow. For acquiescing in so dangerous an order, the O. T. C. was also held to be at fault. Because of the fault of the tactical commanders, (stationed aboard them) the District Judge then declared that the flagships *Fremont* and *Hollis* should be held liable *in rem*.

In exonerating the *Washington*, the District Judge quoted the testimony of the officers of the *Ruchamkin*

and other naval officers who were on the scene to the effect that the *Ruchamkin* and the *Washington* were obscured from one another by the "cargo lights, porthole lights, and mast lights, or what have you, from the formation" until too late to avoid one another. Since neither vessel had an opportunity to detect or to observe the movement of the other in sufficient time to navigate with respect thereto, the District Court concluded that the rule of Special Circumstances[1] governed rather than the Starboard Hand Rule[2] as contended by the Government. Under the Rule of Special Circumstances which the District Judge held applicable, he concluded that the direct, proximate cause of the collision was the:

> "* * * Navy's breach of the special circumstances mandates of the Rules while the *Washington* was in the midst of the flotilla. 33 USCA 112, 121." (141 F. Supp. 97, 101).

The Court of Appeals affirmed the negligence of the *Ruchamkin*, the O. T. C. and the Screen Commander but reversed the exoneration of the *Washington*. The faults charged to the *Washington* were: (1) that the tanker should have distinguished the navy white lights from other white lights visible to her at the same time; (2) that the Starboard Hand Rule and not the rule of Special Circumstances applied; (3) that the tanker was at fault for failing to avoid vessels with which she did not collide; (4) that the tanker should have blown her whistle to a vessel with which she did not collide so as to warn another vessel which she could not at the time see, and (5) that the tanker's mate should have espied the *Ruchamkin*. None

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[1] Art. 27, 29 International Rules; 33 U. S. C. Sec. 112, 121. see p. 58

[2] Art. 19 International Rules; 33 U. S. C. Sec. 101. See p. 57

of these charges were supported by the evidence and it is typical to note that the last was in direct conflict with the finding by the District Court that:

> "There is virtual unanimity among all the watch officers that so numerous were the lights that no particular ship was distinguishable. Even the screen commander lost sight of the *Washington* as her lights merged with the main body's. Nor were they separable on the radarscope. With so many pips on the radarscope, the picture was like 'a cluster of grapes' and individual identification almost impossible." (141 F. Supp. 97, 103).

When the Court of Appeals found the *Washington* also to blame, the question of *in rem* liability of the *Fremont* and *Hollis* became pertinent because of the rule in admiralty that damages are divided on the basis of the number of vessels guilty of contributing fault. See *The Eugene F. Moran*, 212 U. S. 466. The Court of Appeals was divided on the issue of *in rem* liability of the *Fremont* and the *Hollis*, the majority ruling that the damages should be equally divided between the *Ruchamkin* and the *Washington*. Two of the three judges denied assessment of fault *in rem* against the flagships despite confirmation of the negligence of the flag officers stating:

> "Here the *Ruchamkin* was not subject to the control of either the *Fremont* or the *Hollis*, or the Officers of those vessels, but of the Task Commander and the Screen Commander who had taken stations on them, but for whose orders those vessels were no more responsible than if the officers had been stationed on other vessels or, as has been said, than if the officers had been issuing the orders from land or an aeroplane." (241 F. 2d 819, 825).

As will be seen, this statement completely ignores the evidence. These officers could not and did not navigate their juggernaut from land or an aeroplane. They were stationed aboard their flagships, not on other vessels.

Reasons for Granting the Writ of Certiorari.

The decision of the Court of Appeals as to *in rem* liability in effect suspends the tactical commanders in the air above their flagships, totally immunizing these vessels from their faults, although grave. If allowed to stand, this opinion creates a rule for naval vessels different from that applicable to private merchantmen simply because of the Navy's staffing practices. This, we submit, is contrary to the intent of Congress as expressed in the Public Vessels Act,* and deprives merchant shipping throughout the world of the benefits of that long established doctrine of *in rem* liability in admiralty.

Important as the first question may be, the Court of Appeals has violated the clear mandate of this Court to reach it. By simply discarding the well reasoned and abundantly supported opinion of the District Court the Court of Appeals has demonstrated the wisdom of and the need for the decisions of this Court in *McAllister* v. *U. S.*, 348 U. S. 19; *U. S.* v. *U. S. Gypsum Co.*, 333 U. S. 364 and *U. S.* v. *Oregon State Medical Society*, 343 U. S. 326, which state that an appeal in Admiralty is not *de novo*, and that the opinion of the Trial Court may not be set aside unless clearly erroneous. This rule recognizes the limitations

* H. Rep. No. 913, 68th Cong., 1st Sess., at p. 3; S. Rept. No. 941, 68th Cong., 2nd Sess., at p. 3; see also H. Rept. No. 1301, 66th Cong., 3rd Sess., Feb. 7, 1921, see especially letter of the Acting Secretary of the Navy, p. 8; Hearings before Committee on Judiciary of the House of Representatives on H. R. 9075, 68th Cong., 1st Sess., May 21, 1924, pp. 6, 19, 21, 23, 28, 30.

inherent in appellate proceedings and is eminently sound, but what recourse is there to the litigant if the Court of Appeals ignores these decisions? Only certiorari can correct this error.

As to the Question of In Rem Liability

(a) The decision of the Court below is in conflict with the decisions of the Second Circuit in *United States* v. *The Australia Star* and of this Court in *Canadian Aviator Ltd.* v. *United States.*

The liability here urged against the Naval vessels arises under the Public Vessels Act. As to the *Ruchamkin*, her fault resulted directly in her collision with the *Washington* and the Court of Appeals held her liable *in rem*. With respect to the *Fremont* and *Hollis*, the fault of their flag commanders did not result in any physical contact by those vessels. The fault which petitioner claims should be attributed to them did, however, contribute to the collision and it consisted of the negligence of their tactical commanders in their control of or failure properly to control the *Ruchamkin*. The Court of Appeals refused to hold the *Hollis* or the *Fremont* liable because the negligent flag officers were not the regular commanders or masters thereof although physically stationed thereon.

The liability of a public vessel for causing a vessel under its control to collide with a fixed object was established by this Court in *Canadian Aviator Ltd.* v. *United States*, 324 U.S. 215 (1946), where a P. C. boat negligently directed a merchant vessel onto a sunken wreck during their approach to Delaware Bay. The same doctrine was later applied by the Court of Appeals for the Second Circuit to a public vessel which caused a vessel under its control to collide with a third vessel. See *United States* v. *The Australia Star*

(the *Hindoo*), 172 F. 2d 472. There another P. C. boat was escorting a government-owned freighter (the *Hindoo*) and failed to warn its escort or the approaching *Australia Star* of the danger of collision with the latter. The Court of Appeals for the Second Circuit *held the* P. C. *boat liable* for the collision saying:

> "The escort's commander was aware of the danger to his escortee and of his own duty and authority to take measures to avoid it. But aside from the abortive attempt to signal the *Australia Star* and the directing of his searchlight on the *Hindoo*, at the last minute, he did nothing to avoid this collision. In our opinion this was negligence which contributed to the disaster. See Petition of Anthony O'Boyle, Inc., 2 Cir., 161 F. 2d 986." (172 F. 2d 472, 476).

In this case the majority of the Court of Appeals for the Fourth Circuit has refused to follow these two cases although it recognizes their authority. The District Judge and Judge Soper in his dissent from the majority opinion state that in their opinion the rule of the *Canadian Aviator* and the *Australia Star* should apply.

Judge Bryan said—

> "* * * the tactical officer was on board at the direction of the owner; the vessel was furnished him by the owner for his tactical duties. There is nothing inequitable in holding the owner, and the ship it provided for him, responsible for the tactical officer's conduct."

Judge Soper said:

> "In my view the flagships as well as the *Rockaulin* should be held liable for the collision. They furnished the necessary stations for the Task and Screen Commanders who controlled the whole operation.

> they supplied the means and the men by whom the movements of the *Buchanan* were directed and hence were participants in the accident. See United States *v.* Australia Star, 2 Cir., 172 F. 2d 472; Canadian Aviator *v.* United States, 324 U. S. 215; Publicover *v.* Alcoa S. S. Co., 2 Cir., 168 F. 2d 672, 678. On this point I am in accord with the conclusions of Judge Bryan as set out in his opinion in the District Court." (241 F. 2d 819, 826)

It is submitted that Judge Soper and the District Judge Bryan are right and that the majority of the Court of Appeals is wrong in attempting to distinguish this case from the two cases cited. As will be seen, there is no distinction at all in principle between the instant case and these authorities. The claimed distinction is tenuous and is not supported by the facts. In reality the opinion of the Court of Appeals directly conflicts with the Canadian Aviator and the Australia Star.

Judge Parker in his opinion below said that the *Buchanan* was not under the control of the *Fremont* or the *Hollis* or the officers of those vessels, but of the task and screen commanders physically stationed aboard them. He concedes that those flagships would be liable if the O. T. C. and Screen Commander were regular "officers" of their flagships— but he decided that they were not. He said that they were not any more attached to those vessels than if they had been on land or in an aeroplane. This opinion is not only wrong but it makes it impossible to hold a Navy flagship liable for a tactical commander's admitted negligence unless he is also the regular ship's captain. This decision ignores the evidence in the case and if allowed to stand would greatly restrict the liability of Naval vessels under the Public Vessels Act. The District Judge commented on this point in the following language:

"Again, the argument of the Government would vitiate the intent of the Public Vessels Act. Its intendment is to render the United States suable and answerable for a want of care on the part of its authorized personnel in their acts upon its public vessels. Canadian Aviator *v.* United States, 1945, 324 U. S. 215, 224. In the present instance the commodore and the screen commander were certainly lawfully aboard and did, or failed to do, that which was within their authority. In these circumstances, the Act considers their conduct to be their ships'. Indeed, they each had the power to control the movements of the very ships that carried them. Under the Public Vessels Act the liability of the United States is traced through the ship, and if the tactical officer's negligence is not to be ascribed to the ship, then any liability of the United States for the negligence of such officers, no matter how grave, would be put in doubt" (141 F. Supp. 97, 104).

(b) It is a fundamental of Admiralty law that the vessel is answerable for the fault of those lawfully aboard.

The personification of the vessel itself as the wrongdoer is a basic principle of American Maritime law. In *Ralli* v. *Troop*, 157 U. S. 386, 403, this Court said:

"* * * the vessel, in whosoever hands she lawfully is, is herself considered as the wrongdoer, liable for the tort, and subject to a maritime lien for the damages."

See also, *The Brig Malek Adhel*, 2 How 210, 233-237; *The China*, 7 Wall 53, 68; *The Palmyra*, 25 U. S. 1; *The Siren*, 74 U. S. 152, 165; *The John G. Stevens*, 170 U. S. 113, 120, 123; and *The Barnstable*, 181 U. S. 464. Admiralty Jurisdiction of Late Years, Chas. M. Hough, 37 Harvard Law Rev. 529, 541; The Law of Maritime Liens, Griffith

Price, pp. 6-9, 115, 118, *The Eugene F. Moran*, 212 U. S. 466, *Tucker* v. *Alexandroff*, 183 U. S. 424.

This doctrine is the foundation of the decision of this Court in *Canadian Aviator* v. *U. S.* and the decision of the Court of Appeals for the Second Circuit in *United States* v. *The Australia Star* (the *Hindoo*), *supra*. It should not be limited by such a tenuous and unrealistic distinction as that relied upon below.

During World War II the concept of amphibious naval operation underwent a tremendous growth. Today groups of vessels issue forth almost daily from the various Naval installations. They navigate as a coordinated unit in a prescribed formation. In order to achieve this singleness of action an officer is designated to control the movements of all vessels present. Sometimes he is the senior ship master present and sometimes he is a specially assigned staff officer. In either case, his duties are the same. If he is negligent and through such negligence he causes another of his vessels to damage some third ship or object, the question of liability of his flagship arises. Under the doctrine enunciated below, liability would exist if the man was the senior shipmaster, but it would be denied if he were a specially assigned staff officer. Such a distinction is contrary to *The China*, 7 Wall 53.

(c) The tactical commanders were necessarily aboard their flagships.

In the instant case, the task group commander went aboard the *Fremont* prior to sailing with a staff of some fifty officers and men. He took over the communication facilities of the flagship as well as its operational nerve center (the Combat Information Center—CIC—where the ship's voice radios and radars are concentrated). This officer directed the movements of each of the eleven Naval

vessels, including the *Fremont* and was charged with overall responsibility for the successful execution of the operation. The Captains of the several vessels simply transmitted the detailed helm and engine orders necessary to carry out the O. T. C.'s directives. He or his designated representatives were at all times on duty on one of the bridges of the *Fremont* and the maneuvering orders to each of the vessels in the formation were issued over the *Fremont's* facilities.

The screen commander and his smaller staff were stationed aboard the *Hollis*. They also took over the CIC and communication facilities of that vessel. This officer was, under the Task Group Commander (O. T. C.), in charge of the escort or screening vessels of the formation, including the *Hollis*. He directed their navigation and in general maneuvered them so that whatever way the group as a whole might turn, the ships under his command would remain in front as a protective screen. It was through the communication facilities of the *Hollis* that the fateful order to the *Rachamkin* to proceed to station and "expedite" were issued. Here again, the individual destroyer captain operated his vessel within the limits set by the screen commander.

Both of the flag officers had, and exercised, the power to control the navigation of the vessels under their command, including the flagships on which they were stationed. This had to be from a duty station located on one of the ships within the group.

Not only did these officers control the movements of all the ships in the group, but, under the dictates of the U. S. Navy regulations, they were also responsible for their safety. The fact that each vessel had a commanding officer aboard who was also responsible for the safety of the vessel (as any subordinate merchant ship officer or crew member might be) did not reduce the responsibility of the tactical or

screen commander, nor did it isolate them. This dual relationship was well expressed by Admiral C. W. Nimitz, Commander-in-Chief of the U. S. Pacific Fleet, during part of World War II in Volume 82, No. 1, Pages 83, 86 (January 1956), of the United States Naval Institute Proceedings. There he dealt with this problem of dual control as related to efforts to safeguard formations of vessels:

> "The safety of a ship against perils from storm, as well as from those of navigation and maneuvering, is always the primary responsbility of her commanding officer; but this responsibility is also shared by his immediate superiors in operational command since by the very fact of such command the individual commanding officer is not free to do at any time what his own judgment might indicate. * * *.
>
> "It is here that the responsibility rests on unit, group, and force commanders, and that their judgment and authority must be exercised. They are of course the ones best qualified to weigh the situation and the relative urgency of safety measures versus carrying on with the job in hand. * * * More than this, they must be conscious of the relative inexperience in seamanship, and particularly hurricane seamanship, of many of their commanding officers, despite their superb fighting qualities. * * *.
>
> "It is most definitely part of the senior officer's responsibility to think in terms of the smallest ship and most inexperienced commanding officer under him. * * * The very gallantry and determination of our young commanding officers need to be taken into account here as a danger factor, since their urge to keep on, to keep up, to keep station, and to carry out their mission in the face of any difficulty, may deter them from doing what is actually wisest and most profitable in the long run." (p. 86).

Thus, the captains of the various vessels and the group and screen commanders worked together to accomplish the assigned mission. Together they directed the movements of the several naval vessels, including the *Fremont* and *Hollis*. It is completely contrary to the undisputed evidence in this case to hold, as did the Court of Appeals, that the tactical officers had no connection with or control over their flagships.

These men were aboard their flagships at the order of the common owner and for the good of the common venture. They controlled the navigation of all the ships, including their flagships. The owners had the same right of correction over their errors as over the mistakes of the commanding officers. They were charged by the United States Navy Regulations with the duty of safeguarding the vessels under their command and this duty was not diluted one whit by the fact that the subordinate commanding officer of the individual ships also had the duty of safeguarding his ship. These things are the very basis of *in rem* liability. See *The China*, 7 Wall. 53, 68.

There is no basis in fact or logic for saying, as did the Court of Appeals, that their flag commanders were not "officers" of their vessels within the meaning of *Canadian Aviator* and *Australia Star* cases.

(d) The authorities cited by the Court of Appeals are not apposite.

The case of *Publicover* v. *Alcoa Steamship*, 168 F. 2d 672, upon which the Court of Appeals so heavily relies to support its tenuous distinction is really not in point. In that case the same man was master and commodore; his duties as commodore were imposed upon him by another than the owner of his vessel; and no negligence of the

commodore was established. It was because of the second and third of these factors that the Court of Appeals for the Second Circuit refused to hold his flagship liable. In the instant case the master and flag officer were placed aboard by the owner, and negligence on the part of the flag officer has been found by both courts below.

How can the majority of the Court of Appeals cite the *Publicover* as authority for their conclusion that liability should not follow negligence of a flag officer unless he is also master of the vessel, when in that case the same man did serve in both capacities but liability was denied for other reasons?

If the *Publicover* is construed to hold that *in rem* liability cannot be imposed unless the same man holds all vestiges of control over the vessel, it is contrary to *The China* where the vessel was held liable for the fault of the compulsory pilot. We submit that if *The China* is still law, liability *in rem* must follow if anyone lawfully on board a vessel and having authority commits a negligent act of omission or commission through the ship or its appurtenances causing damages to a third party.

The English authorities cited by the Court of Appeals[1] have the same factual distinction as *Publicover*, *supra*, and are also to be differentiated in that they enunciate the British procedural concept of *in rem* liability rather than the American doctrine of personification of the vessel as the wrongdoer. See Griffith Price—Law of Maritime Liens, p. 118.

For these reasons, the majority opinion of the Court of Appeals is, we submit, clearly erroneous and contrary to decisions of this Court and other U. S. Courts of Appeal,

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[1] The Glaucus and City of Florence, 1948 Law Reports (Eng.) Probate Division 95; The Sobieski, 1949 Law Reports (Eng.) Probate Division, C. A. 313.

particularly in the *Canadian Aviator* and *Australia Star* cases and should be reversed.

As to the Question of the Court of Appeals' Review of the Case.

(a) The scope of review by a Court of Appeals has limits defined by this Court.

This petition involves the appeal of an admiralty collision case that was tried to the District Court sitting without a jury. The scope of review of the trial court's decree in such cases is defined by Mr. Justice Minton in *McAllister* v. *United States*, 348 U. S. 19, 20 (1954), but was not followed in this case.

> "* * * In reviewing a judgment of a trial court, sitting without a jury in admiralty, the Court of Appeals may not set aside the judgment below unless it is clearly erroneous. No greater scope of review is exercised by the appellate tribunals in admiralty cases than they exercise under Rule 52(a)[1] of the Federal Rules of Civil Procedure. (Citing cases)."

Although this rule of review may be something of a change for the Courts of Appeal from the old trial *de novo*, it has been very clearly stated in other earlier opinions of this Court. *United States* vs. *U. S. Gypsum Co.*, 333 U. S. 364, 395 and *United States* vs. *Oregon State Medical Society*, 343 U. S. 326, 339 where emphasis was placed upon the opportunity of the trial judge to observe and judge the credibility of the witnesses. This particular element of the trial in this case, especially considering the important witnesses who testified in open court, was a valuable factor in the decision of the trial judge.

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[1] See Appendix, p. 59.

In a recent decision of the Court of Appeals for the First Circuit, in *The Texas Company v. R. O'Brien & Co. Inc.*, 242 F. 2nd 526 that court had occasion to give particular attention to this question stating:

> "• • • Insofar as such action may have been bottomed on the principle that an admiralty appeal was a trial *de novo*, this is no longer law. The present admiralty rule is that findings are not to be reversed unless 'clearly erroneous', comparable to Fed. Rules Civ. Proc. 52(a) 28 U. S. C., McAllister *v.* United States, 348 U. S. 19 (1954). Some courts have held Rule 52(a) not to apply where the findings below were based upon stipulated or undisputed subsidiary facts. We have not." (p. 529).

This case particularly is one where the rule should have been followed.

(b) From a factual standpoint this was not a simple case.

The evidence respecting the circumstances of the collision involved the many details of the navigation of eleven Naval vessels operating as a unit, somewhat like a juggernaught at sea. The intimate interrelation of the ships in the formation and the coordination of the complicated radio and radar communication between them; the silent yet controlling factor of Navy regulations and training that guided the conduct of the Navy personnel; the motives, movement and performance of this complicated exercise that took weeks of preparation and required the presence of trained personnel from Naval units abroad—all were reflected in the testimony of the key officers who were brought from various places on the globe to testify in person at the trial. At least 19 fact witnesses, including practically all of the watch officers of the *Fremont, Hollis,*

Ruchamkin and *Washington*, testified in person before the District Judge. Extensive documentary evidence from all ships, not to mention the many depositions of witnesses who could not attend the trial in person, were thoroughly examined and considered by the careful Trial Judge. The meticulous opinion, amply supported, reflects the excellent craftsman.

Because of the inherent nature of the appellate process, the review of the case by the Court of Appeals was restricted to its consideration of the brief (with appendix) and reply brief by each of the parties and an oral argument of approximately one and one half hours each for appellants and appellee.

Despite this limited presentation, and without declaring or inferring that the opinion of the District Court did not have a basis in the evidence, or was "clearly erroneous", the Court of Appeals undertook to rewrite the facts and the inferences deducible therefrom. This was a wholesale revision—a change in the whole fabric of the case. The scope of this revision may be seen by a listing of the findings which were set aside and the conclusions which were reversed.

(c) Factual Findings of the District Court That Were Set Aside.

1. Basic fact: Were the lights of the Naval vessels recognizable to the tanker's mate as naval vessels operating in unison under a single command?

   Holding: District Court—No.
   Court of Appeals—Yes.

2. Basic fact: Were the lights of the *Ruchamkin* distinguishable to the watch on the *Washington*?

Holding: District Court—No.
Court of Appeals—Yes.

3. Basic fact: Did the *Capricornus* obscure the *Ruchamkin* from the *Washington*?

Holding: District Court—Yes.
Court of Appeals—No.

4. Basic fact: Was the deposition testimony of the tanker's look-out Upton credible in view of the conflicting live testimony of the Naval officers and the tanker's mate?

Holding: District Court—No.
Court of Appeals—Yes.

5. Basic fact: Was there sufficient time for the vessels to maneuver under the starboard hand rule after the two ships were mutually disclosed one to the other?

Holding: District Court—No.
Court of Appeals—Yes.

6. Basic fact: Were the *Washington* and *Ruchamkin* in sight of one another so as to require a whistle-signal for a course change by the tanker?

Holding: District Court—No.
Court of Appeals—Yes.

7. Basic fact: Was the collision between *Washington* and *Capricornus* avoided only by the slowing of the formation?

Holding: District Court—No.
Court of Appeals—Yes.

8. Basic fact: Were the task group and screen commanders "officers" of their flagships?

Holding: District Court—Yes.
Court of Appeals—No.

9. Basic fact: Did the *Washington* have effective warning of the maneuvers of this flotilla in the area?

Holding: District Court—No.
Court of Appeals—Yes.

10. Basic fact: Did the *Washington* have an opportunity to pass behind or astern of the formation?

Holding: District Court—No.
Court of Appeals—Yes.

11. Basic fact: Was there time for effective engine movement by either vessel after first sighting one another?

Holding: District Court—No.
Court of Appeals—Yes.

12. Basic fact: Should the tanker have realized she was in a Naval formation after passing the screen vessels?

Holding: District Court—No.
Court of Appeals—Yes.

(d) Conclusions or inferences which were reversed.

1. Question: Was the collision governed by the starboard hand rule or the rule of special circumstances?

Conclusion: District Court—Special Circumstances.
Court of Appeals—Starboard Hand Rule.

2. Question: Should the tanker be condemned for not going astern of vessels with which it did not collide?

Conclusion: District Court—No.
Court of Appeals—Yes.*

3. Question: Did the mere presence of lights to starboard, regardless of their change in bearing, require the tanker to give way to them?

Conclusion: District Court—No.
Court of Appeals—Yes.

The Court of Appeals never saw the mate of the tanker, the captain of the *Buchanan*, the Officer in Tactical Command, the Screen Commander, nor any of the other witnesses who testified at the trial. The flag and navigating officers of the four key vessels testified as to the appearance of the lights and as to what could and what could not be seen and determined from lights exhibited by the vessels that night. The trial judge also saw and heard a retired high ranking naval officer testify without contradiction about the appearance of formations at sea at night and the responsibility of commands in the Navy. The conclusions of the District Judge were bottomed on his impression of these men as well as on what they said. There was a very substantial evidentiary basis for the opinion and conclusion of the District Court. The Court of Appeals should not have reversed simply because its members might have decided the case differently. As was said in *Lavender v. Kurn*, 327 U.S. 645:

> "... And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might

* This conclusion is in conflict with the opinion of the Second Circuit in *The Steel Inventor*, 43 F. 2d 958.

draw a contrary inference or feel that another conclusion is more reasonable." (p. 653)

(e) The Court of Appeals did not apply the proper standards to its review.

Nowhere in its opinion does the Court of Appeals refer directly or indirectly to the *McAllister* case or to the rule enunciated therein. In only one minor instance did the Court state that a finding of fact was not supported, yet it reversed many findings of the District Court even though it was not and could not be said that those findings were clearly erroneous. It is submitted that the findings made by the District Court were in fact not "clearly erroneous". Certainly no demonstration of such error of the District Judge was ever made. The opinion and decision of the Court of Appeals is, therefore, in conflict with the rule of this Court set forth in *McAllister* v. *U. S.*; *U. S.* v. *U. S. Gypsum Co.* and *U. S.* v. *Oregon State Medical Society*, *supra*. It should be reversed and the opinion and decision of the District Court should be reinstated.

Conclusion.

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Joseph M. Bassett,
Francis N. Greenshaw,
Counsel for Petitioner.

APPENDIX.

Opinion of District Court.

IN THE

UNITED STATES DISTRICT COURT,

FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION.

THE TEXAS COMPANY, owner of the Tanker *Washington*,

Libelant,

v.

THE UNITED STATES OF AMERICA, owner of the USS *Rochambeau*,

Respondent.

UNITED STATES OF AMERICA, owner of the the USS *Rochambeau*,

Libelant,

v.

SS *Washington*, her engines, etc.,
THE TEXAS COMPANY, etc.,

Respondent.

IN THE MATTER

of the

Petition of THE TEXAS COMPANY, as owner of the Tanker *Washington* for exoneration from or limitation of liability.

EVELYN EGBERT, as Administratrix of the Estate of Edward James Egbert, Jr., Deceased; PARLEY BRIGHT, as Administrator of the Estate of Morton Bright, Deceased; CATHERINE BOOTH, as Administratrix of the Estate of Ralph J. Bade, Deceased; BARBARA ALLEN, as Administratrix of the Estate of Kenneth V. Allen, Deceased; MARGARET EDWARDS, as Administratrix of the Estate of John T. Edwards, Deceased; JOSEPH KENNEY, as Administrator of the Estate of Raymond Kenney, Deceased; ROMOLO POMA, as Administrator of the Estate of Pasquale Poma, Deceased,

Libelants,

v.

THE TEXAS COMPANY,

Respondent.

JOSEPH M. BRUSH, Esq., FRANCIS N. CRENSHAW, Esq., Of Counsel for The Texas Company.

THOMAS F. MCGOVERN, Esq., EDWARD B. HAYES, Esq., CHARLES A. BLOCHER, Esq., CHARLES S. HAIGHT, JR., Esq., for the United States of America.

SIMONE N. GAZÁN, Esq., for Claimant Kenney.

JAMES F. O'CONNELL, Esq., WILLIAM P. WOOLLS, JR., Esq., JACK E. GREER, Esq., for Certain Death Cases.

JOHN P. STRAUSS, Esq., for Claimant Pompa.

OPINION OF ALBERT V. BRYAN, U. S. DISTRICT JUDGE:

The U. S. S. *Buchanan* and the tanker *Washington*, of The Texas Oil Company, collided in the Atlantic about fifty miles off the coast of Virginia, just below Cape Henry, soon after two o'clock on the morning of November 14, 1952, with resulting loss of life and personal injuries as well as damage to both ships. Throughout the night the weather was fair, the sky clear, and the wind light, with a smooth sea. A fast destroyer escort, the Navy ship was joining from the rear a formation of ten other naval vessels moving westwardly in an amphibious operation aimed at the Virginia shore. The *Washington*, out of a Gulf port and bound for Philadelphia, was on a northerly heading and had passed through the screen of the formation as it slowed to let her through. Previously hidden from each other by an intervening heavy vessel of the main body, the *Buchanan* and the tanker met as the tanker crossed ahead of, and as the *Buchanan* on the off side and at top speed was overtaking, the intervening ship. The present litigation consists of reciprocal libels between the United States and The Texas Company for the ship injuries, libels against the Company on the death claims, and the petition of the Texas for exoneration or limitation of liability.

On the preceding evening the flotilla had left Norfolk on a mock amphibious attack Operation Seascape upon

Camp Pendleton, located immediately south of Virginia Beach. The task force consisted of a screen of four vessels in a "bent line" or arc protecting a main body of five heavy ships formed in a circle with a radius of 1000 yards and the flagship in the center. The chord of the screen was a stretch of five or six miles. On this night only four ships were in the screen because the *Ruchamkin*, though a screen vessel, was away on a sortie to retrieve a shore detachment and to return with them to the formation at midnight.

U. S. S. *Fremont* was the flagship and guide. In addition to her captain, she carried the Officer in Tactical Command (OTC), in charge of the entire formation. On the extreme left of the screen was the U.S.S. *Corry*, the *Lloyd* next, then the *Hollis* carrying the screen commander as well as her own master, and the *O'Hare* farthest to the right, all destroyer-type craft. The wing tip ships—the *Corry* and *O'Hare*—were stationed 5000 yards from the guide and 75° to each side of her base course line; while the two inner screen vessels were distant 3700 yards from the guide and, respectively, 33° to the right and left of the base course. Around the flagship were the *Glynn*, directly forward; the *Capricornus*, nearly abeam to starboard; (the *Cotter Hall* was to have been on the *Fremont's* starboard quarter, but was detained for repairs and never participated in the maneuvers); the *San Marcos* astern of the flagship; the *New Kent* on the port quarter; and the *Newport News* broad on the *Fremont's* port bow.

The formation steamed almost due east from the Virginia capes. Outbound the *Newport News* on radar picked up the *Washington* to the south, on a northerly course, inshore of the flotilla, and the *Newport News* almost constantly thereafter maintained a track on her. Originally the Navy unit planned to turn south when about sixty miles at sea, and when opposite "Point Yoke"—Camp Pendleton—to head west for the assault. Before reaching the end of the first leg, however, the OTC discovered that an aircraft carrier group was maneuvering south of him and he, therefore, abandoned his intended course change in that direction; instead, the flotilla switched to due north at 0055. About

0115, the flotilla swung from north to west, 270° T. At 0150 again the course was changed, this time to 257° T. The last alteration was necessary to bring the group into Camp Pendleton—to compensate for the abandoned southward movement. Their speed was 14 knots.

In the meanwhile the *Washington*, with all regulation lights burning, was on a course of 71½° T. (9° gyro) and a speed of 14½ knots, her presence well known to the flotilla. She had passed the aircraft carriers and now saw more white lights to starboard, both forward and abeam, and some on her port bow. None seemed nearer than five miles. Save for a temporary deviation to port to give ample way to an unidentified southbound ship, she steadily maintained her course and speed.

The combat intelligence center (CIC) of the *Fremont* had the *Washington* on her radarscope at a range of thirteen miles just before the flotilla changed from its 270° T. course at 0115. Other ships of the group also held the *Washington*. The flag did not consider her to be a threat to his formation, for he reckoned that the *Washington* would pass astern of the group. But when the formation changed to 257° T. at 0150, twenty some minutes before the accident, the *Washington*, then off the *Fremont*'s port bow at a distance of ten miles, was computed to be on a collision course with the *Capricornus*, collision predicted at 0209. This solution was thereafter verified at short intervals, and about three minutes later the *Washington* was bearing 229° T. with a range of 6.7 miles from the *Fremont*, and next at a range of 3.9 miles, bearing 230° T. About 0202 it appeared she would pass through the center of the formation, her closest point of approach being 1700 yards from the *Fremont*. This information was published generally throughout the flotilla at a time when the *Buchanan* was in the area. Because of sea return or other interference, after 0202 the *Washington* was no longer observable on the flagship's radarscope.

At 0205 the formation's speed was reduced from 14 to 8 knots, then to 5 knots at 0207. The *Washington* had not yet passed through the screen. The purpose of the speed

reductions was to let her through. (The clocks of the flotilla were possibly two minutes ahead of the tanker's but the times here are those of the Navy.) On the *Washington*, soon after 0200, the second mate having her con saw two red lights almost dead ahead or fine on the starboard bow, "bright" and "close of me and going across my bow." Immediately he ordered the tanker to 23° gyro (21½° T.) from her base course of 9° gyro (7½° T.). The two red lights were undoubtedly the port side lights of the *Hollis* and the *O'Hare* (the vessels of the right wing of the screen). When these two red lights were well on the tanker's port bow, she went back to 9° gyro or 7½° T. She had passed between the *Hollis* and the *Lloyd*, about a half-mile from the latter, more than a mile from the *Hollis*, and 1200-1500 yards ahead of the *Gilpin*, the lead-ship of the main body.

Just after he had steadied on 7½° T. and was passing the *Capricornus* (the main body's starboardmost ship) the mate saw another red light "very close to my starboard hand, and coming across from my starboard bow to my port bow at a terrific speed." Immediately he gave the tanker hard left rudder and sounded two blasts on her whistle, followed by several short ones. The red light was the *Rachambin* as she sped across the *Washington's* bow. Within seconds the vessels collided, the *Washington's* stem ramming the *Rachambin* a bit aft of midship. It was 0213 *Washington* time, possibly 0215 *Rachambin's*.

Earlier the *Rachambin* had completed her mission and had tailed the formation while it was still steaming eastwardly. About 0138 she reported to the screen commander by voice radio her readiness to join, and in reply was told to wait. At 0140 she reported her arrival to the guide and received acknowledgment at 0155, but her message did not reach the *Fremont's* bridge until after the collision. She was then on the starboard quarter of the main body, bearing 65° T. from the flagship and 6500 yards distant. She had followed around to the right of the group as it changed courses. No warning of the approach of the *Washington* was ever specially given to the *Rachambin* by the guide or by any other ship in the formation. Her commander testi-

fied that he had not received the reports which the *Fremont* had been releasing concerning the tanker. Moving with the same speed as the main body, while waiting, the *Ruchamkin* was next directed by the screen commander to move to a position from which, when ordered, she could assume her station in the screen—immediately to the north and right of the *Hollis*. The tanker was then preparing to go through the screen—on the other side of the *Hollis*—her course 7½°T.—then 21½°T.—then 7½ T., the *Ruchamkin's* 260°T.

For taking position the command to the *Ruchamkin* was to expedite, *i.e.*, to hurry or move "smartly". With engines rung up to 22 knots, she coursed along the right side of the main body, almost parallel to the formation—a divergence of only 3°—and 1000 to 1500 yards from the nearest ship. In effect told to disregard the speed reductions, the *Ruchamkin* was ordered by the screen to "continue to expedite". She obeyed. Still no special warning was given her of the *Washington's* presence inside the screen, though she was in plain view of every vessel of the whole flotilla save the *Ruchamkin*. Indeed, before the *Ruchamkin* encountered the *Washington* the formation had been ordered to resume 14 knots, another assurance to the *Ruchamkin* that all was clear.

The intervening main body—"cargo lights, porthole lights and mast lights; or what you have from this formation"—obscured the *Washington* and the *Ruchamkin* from each other. Then on a 260° or 265° T. course and overtaking what she thought was the *Carter Hall* (not being advised of the latter's absence), but which in fact was the *Capricornus*, the *Ruchamkin* noticed that the next vessel, believed to be the *Glynn*, apparently was closing her. In truth it was the tanker, at a range of not more than 1000 yards. At once the Navy ship went to 270° T., then to 275° T., and then to full right rudder. Only a directional change of 28° was accomplished. She shot across the tanker's bow. Collision followed, within a minute or two from the moment the one observed the other.

Stressing that radar perception does not relax the rigor of the International Rules and insisting that the *Washington* was throughout the burdened vessel in a crossing situation, the United States lays blame to the tanker, in that, she did not give way to the flotilla as a unit or as separate ships. 33 USCA 104. Conceding the premises the tanker contends, however, and the court agrees, that neither before nor after the tanker entered the screen—the two pivotal stages of the case—did the *Washington* breach the right hand rule. Indeed, no transgression of any sort was committed by any vessel before the tanker passed through the screen. The cause of the collision was the Navy's breach of the special circumstances mandates of the Rules while the *Washington* was in the midst of the flotilla. 33 USCA 112,121.

I. Assuming, as the Government asserts, that the tanker had been apprised by public notices of the Navy's plans for Seascape, she was not thereby burdened more heavily than to anticipate the appearance of the Navy ships and to avoid unnecessary interference with them. But even if it was the *Washington's* duty to give way to the formation—if the starboard hand rule accorded precedence to the flotilla as a whole—she had no opportunity to defer. As she stood up the coast, the *Washington* had passed one naval group, and if she was to expect another, nothing in the later lights revealed the arrival of a second formation. Moreover, initially the flotilla planned to move south on its first turning, and thus the tanker might reasonably have believed she would escape the formation entirely.

The merchantman had before him only a maze of white lights. Well could they have marked a fishing fleet or a number of unassociated freighters. All hands agree that traffic was very thick that night. The lights were all within the customary lanes of coastwise shipping and in the routes of vessels bound for and out of the Chesapeake Bay ports. For the last hour the ships of the screen had been repeatedly altering position, as they oriented and reoriented; the main body also, though less radically. These movements

aggravated the confusion of the lights. Blinker as well as light signals from the naval vessels were not intelligible to the stranger and she is not blameworthy for having gleaned nothing from them. Consequently, even if it had been the duty of the tanker to go astern of a naval formation, she had no warning she had met one.

Besides, until 0150, only slightly more than twenty minutes before the collision, the *Washington* was not a threat to the flotilla; as tracked she would pass astern of the group. At that late hour the guide established a collision course with the tanker by turning the flotilla to 257° T. from 270° T. To be sure, the flotilla was entitled to change course, but this alteration was just another factor rendering avoidance of the flotilla more difficult.

In this connection it must be remembered, too, that the tanker and the flotilla were meeting at less than a right angle. Also, because of the eastwardly receding curve of the southerly end of the screen arc, the tanker was not in a situation involving risk of collision with the flotilla until she was beyond the path of the southernmost ship of the screen, the *Corry*. Hence the tanker did not have the choice of skirting the flotilla. At all events, neither of the two left wing or southern vessels of the screen (the *Corry* and the *Lloyd*) ever tendered collision. When the tanker neared, but before she pierced the screen, both the *Corry* and the *Lloyd*, as we have seen, diminished their speed markedly. Their bearing thus did "appreciably change" and risk of collision disappeared. As the *Washington*'s mate said, these ships slid down his starboard hand and dropped astern of him.

Therefore, the tanker, in not at once yielding to the flotilla—in not going astern of the *Corry* or the *Lloyd*—did not violate the right hand rule. While the OTC's decreases of speed were purposed, commendably enough, to minimize the dangers incident to the meeting, those dangers sprang principally from the Navy's desire to maintain a unified formation, a unity which demanded exclusive occupancy of almost twelve square miles of the sea at all times and which had embarrassed the *Washington a limine*. But

having slowed his ships, the OTC intended for the tanker to continue as she did. On glimpsing the red side light of the *Hollis* to starboard, however, the *Washington* immediately righted her wheel—going from 7½°T. to 21½°T.—but returned to her original course as soon as the *Hollis* was away. The tanker did not attempt to pass eastwardly through the formation; the screen commander admitted that he was mistaken in so announcing to the flotilla.

Just as the tanker's behavior before she penetrated the screen was blameless, so for entering it she is not censurable. There was no other way for her. Had she stopped or slowed she would have been enveloped by the flotilla; had she gone astern of the *Lloyd*, she would have engaged the main body of the formation.

II. Furthermore, the *Washington* committed no fault of navigation after she moved into the field of the flotilla. When she resumed 7½°T. she was departing the formation, crossing the bow of the outermost heavy ship, the *Capricornus*, at a range estimated by the OTC as from 500-800 yards and by the watch of the *Capricornus* at 2000-2500 yards. Already she had cleared the *Glaux*, the van of the main body, by 1200-1500 yards. At this time the *Capricornus* was at five knots. (In an answer to interrogatories the Government stated that the *Capricornus* was a darkened ship from midnight until 0200; but the Government asserts this was an error, and the court so finds.) Obviously the flag considered the *Washington* safely away as she passed the *Capricornus*, for he thereupon ordered the whole flotilla to resume its regular 14-knot speed.

The meeting of the *Ruchamkin* and the *Washington* was not controlled by the starboard hand rule, for neither vessel could see the other. *Lind* v. *United States*, 2 Cir. 1946, 156 F. 2d 231, 233. There is no acceptable proof that the tanker could visually have espied the *Ruchamkin*, or the *Ruchamkin* the tanker, before the other emerged from the obstruction of the *Capricornus*. Wholly incredible is the testimony of the tanker's lookout that he discerned the lights of the *Ruchamkin* before and just after 0200, reporting them to

the bridge each time, and could recognize them as the ship with which the tanker collided. The Court cannot find, as does the Government, any corroboration of the lookout in the testimony of the tanker's wheelsman. There is virtual unanimity among all the watch officers that so numerous were the lights that no particular ship was distinguishable. Even the screen commander lost sight of the *Washington* as her lights merged with the main body's. Nor were they separable on the radarscope. With so many pips on the radarscope, the picture was like "a cluster of grapes" and individual identification almost impossible.

As the *Ruchamkin* was not in sight, the *Washington* was not required by Article 28, 33 USCA 113, to give *Ruchamkin* a whistle signal of the tanker's return to 7½ T. A blast then might incidentally have been helpful or it might have been confusing, but as it was not owed the *Ruchamkin*, its omission was not fault.

Governing here are the special circumstances rules, Articles 27 and 29, 33 USCA 112, 121. Both vessels exerted themselves to the utmost to avoid collision after their presence was mutually disclosed. From that moment no negligence can be laid to either. Although "right hard rudder" by the *Ruchamkin* might have saved her, it is doubtful; her master was acting *in extremis* and he must not be judged too nicely. But earlier neglect of the Navy directly and proximately accounts for the collision.

No explanation is offered why the *Ruchamkin* did not receive and regard the advice repeatedly given the flotilla both by the OTC and by the screen commander of the tanker's progress; no reason is given why the *Ruchamkin* was not alert to the danger she might well anticipate from the stranger. In these respects she was negligent. Again, with the tanker proceeding between the *Lloyd* and the *Hollis* and the formation slowing to let her through, the screen commander nevertheless called the *Ruchamkin* to speed across the bows of the *Washington*, at the same time misjudging the course of the merchantman. For allowing the *Ruchamkin* to follow an order so plainly perilous, the OTC, too, was negligent. Though the expediting order

established an obvious risk of collision, no effort was made to caution the tanker against the imminent danger. Utterly ineffectual as a signal were the flashing lights sent her from the *Fremont*. Delayed until the tanker was passing the *Capricornus* and designed only to reprimand the *Washington* for traversing the area, they were focused not from a nearby ship but from the flagship, a vessel encircled by other ships. Light signals that night had not been effective between the members of the naval group themselves—not even the screen commander could be raised by the *Ruchamkin* by lights.

If a private vessel, the *Ruchamkin* because of her negligence would be liable *in rem*, and her owner would be liable *in personam*, for the damage to the tanker. Hence here the United States must answer on both principles. Public Vessels Act, 46 USCA 781. *Ruchamkin* is also liable under the *in rem* principle, and the Government *in personam*, for the negligence of the commodore and the screen commander. This liability is not fixed by virtue of a military chain of command; it is predicated upon what these officers did or left undone while present and in authority. Moreover, by reason of their authority to direct her moves, they were constructively aboard the *Ruchamkin*. As we later point out specifically, the *Fremont* and the *Hollis* are also liable under the *in rem* principle, and the United States *in personam*, for the negligence of the tactical officers respectively aboard them. No other ship in the flotilla is found guilty of tortious conduct.

The court has decided the issue of the *in rem* liability of the *Fremont* and *Hollis* because the Government requested a finding on this head. Each of these two vessels had her own master and the United States urges with much force and logic that, as the mistakes of the tactical officers occurred in their actions as commodore and screen commander, and not in the navigation of the ships they were aboard, these vessels are not chargeable with such negligence. Strong precedent is cited to this point. *Publicover* v. *Alcoa S.S. Co.*, 2 Cir. 1948, 168 F. 2d 672, 678; the *Glaucus* and *City of Florence*, 1948, Law Reports (Eng.) Probate

Division 95; *The Sobieski*, 1949, Law Reports (Eng.) Probate Division, C. A. 313. But in all of these cases the commodore's vessel was owned by another than the employer of that officer. Moreover, in each instance he was aboard or acting in that capacity without the invitation or desire of the owner.

On the other hand, instantly the tactical officer was on board at the direction of the owner; the vessel was furnished him by the owner for his tactical duties. There is nothing inequitable in holding the owner, and the ship it provided for him, responsible for the tactical officer's conduct. In *United States* v. *The Australia Star*, 2 Cir. 1949, 172 F. 2d 472, 476, the Government's escort ship was held liable for failing to give both her escortee and a stranger-vessel warning of the approach of each other. True, there the escort's master and the escort officer were the same person; but, surely, the division of these responsibilities between two officers, instead of vesting them in one, does not destroy the principle. We find no repudiation of *The Australia Star* evinced in *United States* v. *The Adriatico*, 2 Cir. 1951, 190 F. 2d 884.

Again, the argument of the Government would vitiate the intent of the Public Vessels Act. Its intendment is to render the United States suable and answerable for a want of care on the part of its authorized personnel in their acts upon its public vessels. *Canadian Aviator, Ltd.* v. *U. S.*, 1945, 324 U. S. 215, 224. In the present instance the commodore and the screen commander were certainly lawfully aboard and did, or failed to do, that which was within their authority. In these circumstances the Act considers their conduct to be their ships'. Indeed, they each had the power to control the movements of the very ships that carried them. Under the Public Vessels Act the liability of the United States is traced through the ship, and if the tactical officer's negligence is not to be ascribed to the ship, then any liability of the United States for the negligence of such officers, no matter how grave,

Finally, proctors for the Government complain of the court's refusal to direct production before trial by The Texas Company of the statements of four members of the *Washington*'s crew, "especially when the Government's Board of Inquiry testimony had been required to be turned over to The Texas Company" and because this was a "ruling for attorney privilege and against naval privilege". They request the court "for the benefit of the record" to "note the Government's contention." It is so noted, but it is fundamentally in error. Only because the statements were the personal work product of counsel was pretrial access to this memoranda not allowed; at the trial the Government was unrestricted in its cross examination of these witnesses; and not the slightest prejudice to the United States was suggested at the hearing. But as to the Government's production before trial, the fact is that nothing was "required" of it. The Court ordered discovery in precisely the terms the Government itself had offered disclosure; no more was ordered than was tendered. Further, its proctors repeatedly disclaimed any privilege—specifically, on June 2, 1954, and again on September 13, 1955.

Adopting this memorandum as its findings of fact and conclusions of law, the court will on presentation enter a decree in each of the death suits and in the limitation proceeding exonerating the *Washington* and The Texas Company, and will pass a decree in The Texas Company libels fixing liability upon the United States in accordance with the views herein expressed.

(Signed) Allen E. Beaty
United States District Judge

April 17th, 1956.

Opinion of U. S. Court of Appeals, Fourth Circuit.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 7284.

UNITED STATES OF AMERICA, owner of the USS. *Rachamkin*,
Appellant,

versus

SS. *Washington*, her engines, etc., THE TEXAS COMPANY, etc.,
Appellee.

No. 7285.

UNITED STATES OF AMERICA, owner of the USS. *Rachamkin*,
Appellant,

versus

THE TEXAS COMPANY, owner of the tanker *Washington*,
Appellee.

No. 7286.

EVELYN EGGLESTON, Administratrix of the Estate of Edward James Eggleston, Jr., Deceased, *et al.*,
Appellants,

versus

THE TEXAS COMPANY,
Appellee.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT ALEXANDRIA.

(Argued November 16, 1956. Decided January 25, 1957.)

Before PARKER, Chief Judge, SOPER, Circuit Judge, and R. DORSEY WATKINS, District Judge.

Marvin Schwartz (William P. Wools, Jr., Betty H. Olchin, and James P. O'Connell on brief) for Appellants in No. 7286; Thomas F. McGovern, Attorney, Department of Justice (L. S. Parsons, Jr., United States Attorney, Leavenworth Colby, Edward B. Hayes, and Charles S. Haight, Jr., Attorneys, Department of Justice, on brief), for Appellant in Nos. 7284 and 7285, and Francis N. Crenshaw (Baird, White & Lanning, and Joseph M. Brush on brief), for Appellee.

PARKER, Chief Judge.

These are appeals in admiralty cases growing out of the collision between the tanker *Washington* of the Texas Company and the destroyer *Richard Ing*, a vessel of the United States Navy, which occurred in the early morning of November 14, 1952, about 5 miles off the Virginia capes. Libels *in rem* and *in personam* were filed by the owners of both vessels against each other, and suits seeking damages on account of wrongful death were filed against the Texas Company in behalf of the personal representatives of soldiers aboard the *Richard Ing* who were killed by the collision. All of these cases were heard together and decrees were entered exonerating the *Washington* of fault, finding negligence in the operation of the *Richard Ing* and entering an interlocutory decree for the damages against the United States and in favor of the Texas Company. The libels filed on account of wrongful death were dismissed. See the *Richard Ing*, D. C., 141 F. Supp. 97. The United States and the death claimants have appealed. They do not contest the finding of fault on the part of the *Richard Ing* nor the finding of *in personam* liability on the part of the United

States for negligence in her navigation; but they contend that the *Washington* should also be held in fault in the collision. We think that this contention must be sustained.

As pointed out in the opinion below, the *Buchanan* was one of a number of naval vessels engaged in an operation off the Virginia capes. At the time of the collision, they were proceeding to a prearranged destination off Virginia Beach near Camp Pendleton and were on a course of 257 degrees. The *Fremont* was the guide ship of the flotilla and around her were grouped five other heavy ships in a circle with a radius of 1,000 yards. Ahead of this formation was a screen of four destroyers, the *Corry*, the *Lloyd*, the *Hollis* and the *O'Hare*. The *Buchanan* had been on a mission to pick up some soldiers and was returning to take her place in the screen of destroyers when the collision occurred.

The *Washington* was proceeding on a course of 74½ degrees. Although she had seen to starboard the lights of the naval flotilla which was on a course of 257 degrees, she entered the screen of destroyers passing between the *Lloyd* and the *Hollis* and avoiding collision only because the ships of the flotilla, other than the *Buchanan*, had been slowed down from 14 to 8 and then to 5 knots per hour. The *Buchanan* was not ordered to slow down and was not told of the presence of the *Washington* within the screen but was ordered to "expedite" to her place in the formation and was proceeding at a speed of 22 knots per hour to her place in the screen on a course 1200 to 1500 yards north of and practically parallel with (265 degrees), the course of the [illegible] the [illegible], the *Gwin* [illegible]. We think, as did the judge below, that it was negligence on the part of those in charge of the naval operation not to advise the *Buchanan* of the presence of the *Washington* within the screen and to instruct the *Buchanan* forward at such a high rate of speed, in view of the dangerous situation existing; but we think that the *Washington* was at fault in failing to observe the starboard [illegible] rule both before entering the screen and after it was entered, and was in fault, also, in failing to keep a proper lookout and in failing to take

proper precautions to avoid the collision, when by the exercise of proper care it might have been avoided.

We are not impressed by the contention that those on the *Washington* did not know that they were approaching a naval formation at a time when they might have passed around it and avoided all danger. The lights of the flotilla were seen to starboard and were recognized by two men on lookout as naval vessels. Their number and their signalling to each other with blinker lights should have put the *Washington* on notice, apart from the fact that the Navy had published notice of the operation in such way that it is hardly reasonable to suppose that ships of the Texas Company were not advised of it.* The explanation that those on the *Washington* thought the flotilla to be a fleet of fishing vessels is not borne out by the evidence which shows that they were not displaying the sort of lights that fishing vessels would display. Very illuminating, in this connection, is the fact that on the morning after the collision, the captain, who had been asleep at the time of the collision, gave a statement to the press that the cause of the collision was that the flotilla was navigating without lights. When asked about this at the Coast Guard investigation of the collision, he said, "But had they been using any lights, we would have seen them; they wouldn't have gone [close] as that quickly without any [warning to us]." The evidence shows that all of the ships were fully lighted, that the night was clear and that there was nothing to prevent the lights being seen.

If it be assumed that those on the *Washington* did not recognize the naval flotilla for what it was and that the vessel was without fault in entering the section, she would, nevertheless, not be absolved from the duty of observing the starboard hand rule with respect to the vessels that she met. In *The Oregon*, 158 U. S. 186, 15 L. Ed. 932, we held that the rule was applicable to the case of a merchant vessel crossing the course of vessels in a naval formation, even

* [illegible] Navy's Notice to Mariners covering the proposed operations had been published by the Coast Guard on November 10 to the Texas Company in New York and the copies to the Texas

though the latter had been "blacked out" until shortly before the collision. If that rule had been properly observed by the *Washington*, it seems clear the collision here would have been avoided, notwithstanding the negligence in the navigation of the *Ruchamkin*. "The International Rules for Navigation at Sea" as they were at that time, are as follows:

Article 19, 33 USCA sec. 104. "When two steam vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other."

Article 21, 33 USCA sec. 106. "Where, by any of these rules, one of two vessels is to keep out of the way the other shall keep her course and speed.

"Note.—When, in consequence of thick weather or other causes, such vessel finds herself so close that collision cannot be avoided by the action of the giving-way vessel alone, she also shall take such action as will best aid to avert collision."

Article 22, 33 USCA sec. 107. "Every vessel which is directed by these rules to keep out of the way of another vessel shall, if the circumstances of the case admit, avoid crossing ahead of the other."

Article 23, 33 USCA sec. 108. "Every steam vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop or reverse."

Article 27, 33 USCA sec. 112. "In obeying and construing these rules due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger."

Article 29, 33 USCA sec. 121. "Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any pre-

caution which may be required by the ordinary practice of seamen, or by the special circumstances of the case."

Notwithstanding that the second mate in charge of navigating the *Washington* knew that there were a number of vessels to his starboard, whose lights he could see, and that it was his duty to keep out of the way of any such vessels as might attempt to cross his course, we think it clear from the evidence that he made no proper effort to discharge his duty in this respect. The *Washington* was equipped with radar and he admits that he did not look at it after 2 A. M., which was fifteen minutes prior to the collision. The radar of the *Fremont* showed the *Washington* to be on a collision course with the *Capricornus* of the flotilla and collision was avoided only by the slowing down of the flotilla. If proper attention had been paid to the radar on the *Washington*, the danger of collision, not only with the *Capricornus* but also with the *Rockland*, should have been seen. Furthermore, the second mate was keeping no adequate lookout. If a proper look out had been kept, he should at least have seen the approaching lights of the *Lloyd*, the *Newport News*, the *Algol* and the *Capricornus*, and yet he passed these vessels without observing them, although so near to them that collision with the *Capricornus* was averted only by the slowing of the flotilla.

If a proper lookout had been maintained, there is no reason why the approaching lights of the *Rockland* should not have been observed well in advance of the collision. After the *Washington* had crossed the course of the *Algol*, there is no reason why she should not have seen the approaching lights of the *Rockland*, which was steering at 22 knots per hour as compared with the speed of 7 or 8 knots of the other vessels of the flotilla. This speed should in itself have attracted attention, and at this time the *Washington* had reached a position where the lights of the other vessels would not be confusing, as there were no other vessels of the flotilla in the direction of the *Rockland* except the *Capricornus*.

It is argued that the *Capricornus* shut off the view of the *Ruchamkin* from the *Washington;* but the evidence does not justify our accepting this as a fact. The *Ruchamkin* was on a course 1200 to 1500 yards beyond that of the *Capricornus.* She was traveling 22 knots as compared with 5 or 8 of the *Capricornus* and 14 of the *Washington.* The *Capricornus* was only 459 feet in length with a 63 foot beam; and she could have been for only a very brief space of time in the direct line of vision between the *Washington* and the *Ruchamkin,* and even for this brief period there is no reason why the white mast and range lights should not have been seen and noticed, especially as they were moving at such an unusual speed. The lookout on the *Washington,* one Upton, testified at the Coast Guard hearing that he did indeed notice them ten minutes before the collision and twice reported them to the bridge by ringing a bell. This testimony is corroborated by the helmsman, who testifies that he heard the bell; and we see no reason why it should not be accepted, as it is entirely reasonable and was given shortly after the collision at the Coast Guard hearing. The mate testifies that he paid no attention to the bell signals from the lookout because he was in position to see and judge of the lights better than the lookout. Whether the testimony of Upton is accepted or not, we think it clear that if a proper lookout had been maintained by the mate, the *Ruchamkin* would have been discovered in ample time to have avoided the collision. "The ship will be held in fault if the lookout fails to see or hear what, if he had given heed, he should have seen or heard." Robinson on Admiralty p. 814. *The New York,* 175 U. S. 187, 204. *The Colorado,* 91 U. S. 692, 699. As said in the case last cited:

> "Lookouts are valueless unless they are properly stationed, and vigilantly employed in the performance of their duty; and if they are not, and in consequence of their neglect the approaching vessel is not seen in season to prevent a collision, the fault is properly chargeable to the vessel, and will render her liable, unless the other vessel was guilty of [illegible]

Even if the *Rachamkin* had not been discovered until the course of the *Capricornus* had been crossed, there is no reason why the collision might not have been avoided in the exercise of reasonable care on the part of the *Washington*. Several minutes elapsed between that time and the time necessary to cover the twelve or fifteen hundred yards of distance before the course of the *Rachamkin* could be reached; and, in this time, the engines could have been reversed, an alarm sounded on the whistle and the course of the vessel changed so as to avoid collision. If nothing had been done but reverse the engines, the collision would have been avoided, as the *Rachamkin* nearly cleared the *Washington* as it was, being struck well abaft her beam. A slight slowing up of the *Washington*, with a delay of only a few seconds in reaching the crossing course, would have enabled the *Rachamkin* to have crossed in safety. The evidence is that those on the *Rachamkin* allowed some time to elapse without doing anything after the *Washington* was seen by them. Their excuse for this delay was that they thought that the *Washington* was one of the ships of the flotilla. The *Washington* should have seen the *Rachamkin* as soon as the *Rachamkin* saw her, and she could not have been misled as to the danger. Certainly, when she crossed the course of the *Capricornus*, she should have realized the danger presented by the oncoming *Rachamkin* and should have taken instant steps to keep out of her way. This she did not do, manifestly because a proper lookout was not being kept, as the mate testifies that the crash came within thirty seconds of his sighting the *Rachamkin*. The whistle was not blown until the vessels were in collision. Such negligence cannot be excused as error in extremis. As said in *Cuba Distilling Co. v. Great Lakes*, 2 Cir., 143 F. 2d 409, and quoted by us in *The Oregon*, *supra*: "* * * men, charged with responsibilities of command, must not be wholly incapacitated for sound judgment when suddenly thrust into peril. Part of their equipment for their duties is some ability to think, be the situation ever so sudden and so grave."

Other negligence in the operation of the *Washington* was failure to sound her whistle when changing course. When passing between the *Lloyd* and the *Hollis*, she changed her course 14 degrees to starboard and, after she had passed between these vessels, went back on the original course without sounding her whistle as required by the rules at the time of either change. By that time, at least, the *Washington* should have realized that she was within the screen of the naval formation and should have followed the rules strictly, not only for the sake of the vessel which she was seeking to avoid, but also for the sake of advising the other vessels of the flotilla of what she was doing. If, however, regard be had only to the *Rochambin*, a proper lookout would have advised the *Washington*, as we have seen, that she was on crossing courses with that vessel and that the warning signal should be given for her benefit.

Since both the *Rochambin* and the *Washington* were at fault, the damages resulting from the collision should be divided equally between them so that one-half shall be borne by the Texas Company and one-half by the United States, and this applies to the *in personam* as well as to the *in rem* liability. The Texas Company argues that there is *in rem* liability on the part of the *Fremont* and the *Hollis*, as the Task Commander directing the entire flotilla was aboard the *Fremont* and the Screen Commander directing the destroyers was aboard the *Hollis*. The argument is that negligence in ordering the *Rochambin* to expedite to her position in the screen and in not warning her of the presence of the *Washington* was a contributing cause of the collision, and that the vessels carrying the Task Commander and the Screen Commander are liable *in rem* for their negligence in this regard. The judge below expressed an opinion to this effect although the question was not reached in the decision which he rendered. If this position can be sustained, it will result that although the *Washington* was the burdened vessel and was at least as much if not more to blame for the collision than the *Rochambin*, the United States will have to bear three-fourths of the damage resulting from the collision and the Texas Company only

one-fourth merely because the fleet officers were located on vessels other than the *Rachamkin*. We do not think that the position can be sustained or that any such result is required. The *Rachamkin* was not operating under the direction of any other vessel or the officers of any other vessel. She sustained the same relationship to the Task Commander as did other vessels of the flotilla and the same relationship to the Screen Commander as did the other destroyers in the screen. Other vessels of the flotilla were no more liable for her fault caused by negligence in the directions of these officers than if the officers had been issuing the orders from land or from an aeroplane.

It is well settled, of course, that where vessels operating together are at fault in a collision, each is responsible *in rem* for its proportionate part of the damage even though they belong to the same owner. *The Eugene F. Moran*, 212 U. S. 466. It is equally well settled, however, that notwithstanding common ownership, *in rem* liability exists only with respect to a vessel which is at fault in the collision. *Liverpool, Brazil & River Plate Steam Nav. Co. v. Brooklyn Eastern District Term.* 251 U. S. 48; *Sacramento Nav. Co. v. Salz* 273 U. S. 326, 332. If a vessel in collision is in control of another vessel or its commanding officer, the latter is held to *in rem* liability, if in fault, on the ground that it controlled the ship in collision. This is the basis of liability in the *United States v. Luckenbach Steamship Co.*, 2 Cir., 172 F. 2d 472; relied on by the Texas Company, where a convoy was subject to the orders of an escort vessel. It is the basis of liability, also, in the case of the *Canadian Aviator v. United States*, 324 U. S. 215, where the injured vessel was under the direct control of the vessel held liable, which was guiding the injured vessel through dangerous waters. Here the *Rachamkin* was not subject to the control of either the *Fremont* or the *Hollis*, or the officers of those vessels, but of the Task Commander and the Screen Commander who had taken stations on them, but for whose orders those vessels were no more responsible than if the officers had been stationed on other vessels or, as has been said, than if the officers had been issuing the orders from land or an aeroplane.

Very much in point is the case of *Publicover* v. *Alcoa SS Company*, 2 Cir., 168 F. 2d 672, 675, 678. In that case there was a collision between a schooner and a steamship, the *Alcoa Pilot*, which was one of a convoy of vessels. The commodore of the convoy was master of another vessel, the *Cyrus Field*. It was attempted to hold the *Cyrus Field* to liability for alleged failure of the commodore to do his duty in his capacity as commodore. In holding the *Cyrus Field* not liable, the court, speaking through Judge Learned Hand, said:

> "Finally, even though we were to press the liability of the '*Cyrus Field*' as a factitious jural person, she was not at fault; she did not contribute to the collision. The hypothesis is that it was the failure of the commodore to take charge of the '*Alcoa Pilot's*' navigation which was the fault."

See also *The Glaucus* and *City of Florence* 1948 Law Reports (Eng.) Probate Division 95; *The Sobieski* 1949 Law Reports (Eng.) Probate Division C. A. 313.

One other point raised by the appeal may be dismissed with brief mention. The government complains that it was an abuse of discretion on the part of the trial judge not to require counsel for the Texas Company to produce statements of witnesses taken by counsel when the production, with certain security precautions, of evidence taken at the Naval Court of Inquiry was ordered in accordance with the practice approved by this court in *The Oregon*, 4 Cir., 175 F. 2d 632. This was a matter resting very largely in the discretion of the trial judge, who had to decide to what extent the statements made to counsel were privileged. We cannot see that the discretion was abused or that the case of the government was in any way prejudiced, as counsel for the government were given full opportunity to examine and cross examine the witnesses whose statements they requested.

For the reasons stated, the decrees appealed from will be reversed in so far as they absolve the *Washington* and

the Texas Company from liability, but affirmed in so far as they establish liability on the part of the United States for the fault of the *Ruchamkin;* and the cases will be remanded to the court below for further proceedings not inconsistent herewith.

Affirmed in Part,
Reversed in Part, and
Remanded with Directions.

SOPER, Circuit Judge (dissenting in part).

In my view the flagships as well as the *Ruchamkin* should be held liable for the collision. They furnished the necessary stations for the Task and Screen Commanders who controlled the whole operation, they supplied the means and the men by whom the movements of the *Ruchamkin* were directed and hence were participants in the accident. See *United States* v. *Australia Star*, 2 Cir., 172 F. 2d 472; *Canadian Aviator* v. *United States*, 324 U. S. 215; *Publicover* v. *Alcoa*, 2 Cir., 168 F. 2d 672, 678. On this point I am in accord with the conclusions of Judge Bryan as set out in his opinion in the District Court.

Public Vessels Act.

(46 U. S. C., §§781, 782)

"§781. Libel in admiralty against or impleader of United States

"A libel in personam in admiralty may be brought against the United States, or a petition impleading the United States, for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States: *Provided*, That the cause of action arose after the 6th day of April, 1920. Mar. 3, 1925, c. 428, §1, 43 Stat. 1112."

"§782. Venue of suit; application of provisions of chapter 20

"Such suit shall be brought in the district court of the United States for the district in which the vessel or cargo charged with creating the liability is found within the United States, or if such vessel or cargo be outside the territorial waters of the United States, then in the district court of the United States for the district in which the parties so suing, or any of them, reside or have an office for the transaction of business in the United States; or in case none of such parties reside or have an office for the transaction of business in the United States, and such vessel or cargo be outside the territorial waters of the United States, then in any district court of the United States. Such suits shall be subject to and proceed in accordance with the provisions of chapter 20 of this title or any amendment thereof, insofar as the same are not inconsistent herewith, except that no interest shall be allowed on any claim up to the time of the rendition of judgment unless upon a contract expressly stipulating for the payment of interest. Mar. 3, 1925, c. 428, §2, 43 Stat. 1112."

Suits in Admiralty Act.

(46 U. S. C., §§741, 742, 743)

"§741. Exemption of United States vessels and cargoes from arrest or seizure

No vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no cargo owned or possessed by the United States or by such corporation, shall, in view of the provisions herein made for a libel *in personam*, be subject to arrest or seizure by judicial process in the United States or its possessions: *Provided*, That this chapter shall not apply to the Panama Railroad Company. Mar. 9, 1920, c. 95, §1, 41 Stat. 525."

"§742. Libel *in personam*

In cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel *in personam* may be brought against the United States or against any corporation mentioned in section 741 of this title, as the case may be, provided that such vessel is employed as a merchant vessel or is a tugboat operated by such corporation. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. The libelant shall forthwith serve a copy of his libel on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States and such corporation. In case the United States or such corporation shall file a libel *in rem* or *in personam* in any district, a cross libel *in*

personam may be filed or a set-off claimed against the United States or such corporation with the same force and effect as if the libel had been filed by a private party. Upon application of either party the cause may, in the discretion of the court, be transferred to any other district court of the United States." Mar. 9, 1920, c. 95, § 2, 41 Stat. 525."

"§ 743. Procedure in cases of libel *in personam*

Such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties. A decree against the United States or a corporation mentioned in section 741 of this title may include costs of suit, and when the decree is for a money judgment, interest at the rate of 4 per centum per annum until satisfied, or at any higher rate which shall be stipulated in any contract upon which such decree shall be based. Interest shall run as ordered by the court. Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. If the libelant so elects in his libel, the suit may proceed in accordance with the principles of libels *in rem* whenever it shall appear that had the vessel or cargo been privately owned and possessed a libel *in rem* might have been maintained. Election so to proceed shall not preclude the libelant in any proper case from seeking relief *in personam* in the same suit. Neither the United States nor such corporation shall be required to give any bond or admiralty stipulation on any proceeding brought hereunder. Any such bond or stipulation given prior to March 9, 1920, in admiralty causes by the United States or the United States Maritime Commission, shall become void and be surrendered and canceled upon the filing of a suggestion by the Attorney General or other duly authorized law officer that the United States is interested in such cause and assumes liability to satisfy any decree included within said bond or stipulation, and thereafter any such decree shall be paid as provided in section 748 of this title. Mar. 9, 1920, c. 95, § 3, 41 Stat. 526; Ex. Ord. No. 6166, § 12, June 10, 1933; June 20, 1936, c. 858, §§ 203, 204, 904, 49 Stat. 1987, 2046."

Starboard Hand Rule and Related Rules of Navigation.

(33 U. S. C., 101, 104, 106, 107, 108)

"101. Suggestion for ascertainment of risk of collision. Risk of collision can, when circumstances permit, be ascertained by carefully watching the compass bearing of an approaching vessel. If the bearing does not appreciably change, such risk should be deemed to exist. (Aug. 19, 1890, c. 802, sec. 1, 26 Stat. 326.)"

"104. Steam vessels crossing. *Art. 19.* When two steam vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard shall keep out of the way of the other. (Aug. 19, 1890, c. 802, sec. 1, 26 Stat. 327.)"

"106. Vessel having right of way to keep course. *Art. 21.* Where, by any of these rules, one of two vessels is to keep out of the way the other shall keep her course and speed."

"Note. When, in consequence of thick weather or other causes, such vessel finds herself so close that collision cannot be avoided by the action of the giving way vessel alone, she also shall take such action as will best aid to avert collision. (See Articles 27 and 28 of May 28, 1894, c. 91, 28 Stat. 205.)"

"107. Crossing ahead of vessel having right of way. *Art. 22.* Every vessel which is directed by these rules to keep out of the way of another vessel shall, if the circumstances of the case admit, avoid crossing ahead of the other. (Aug. 19, 1890, c. 802, sec. 1, 26 Stat. 327.)"

"108. Duty of steam vessel to slacken speed. *Art. 23.* Every steam vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop or reverse. (Aug. 19, 1890, c. 802, sec. 1, 26 Stat. 327.)"

Special Circumstances and General Prudential Rules.

(33 U. S. C., §§ 112, 121.)

"Sec. 112. Special circumstances requiring departure from rules. *Art. 27.* In obeying and construing these rules due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger. (Aug. 19, 1890, c. 802, sec. 1, 26 Stat. 327.)"

"Sec. 121. Additional precautions required generally. *Art. 29.* Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper look-out, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case. (Aug. 19, 1890, c. 802, sec. 1, 26 Stat. 328.)"

"Whistle" Rule.

(33 U. S. C., § 113.)

"113. Sound signals of steam vessel indicating course. *Art. 28.* The words 'short blast' used in this article shall mean a blast of about one second's duration.

"When vessels are in sight of one another, a steam vessel under way, in taking any course authorized or required by these rules, shall indicate that course by the following signals on her whistle or siren, namely:

"One short blast to mean, 'I am directing my course to starboard.'

"Two short blasts to mean, 'I am directing my course to port.'

"Three short blasts to mean, 'My engines are going at full speed astern.' (Aug. 19, 1890, c. 802, sec. 1, 26 Stat. 328.)"

Federal Rules of Civil Procedure.

Rule 52. Findings by the Court.

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41 [illegible] 27, 1946, effective March 19, 1948.